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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY TYVELL
GRANDBERRY,

Defendant and Appellant.

2d Crim. No. B287448
(Super. Ct. No. YA092941)
(Los Angeles County)

Anthony Tyvell Grandberry appeals from the judgment after a jury convicted him of two counts of making criminal threats (Pen. Code,¹ § 422, subd. (a)), one count of dissuading a witness (§ 136.1, subd. (b)(1)), and one count of misdemeanor vandalism (§ 594, subd. (a)), and found true an allegation that he committed vandalism for the benefit of a criminal street gang (§ 186.22, subd. (d)). Grandberry admitted allegations that he suffered a prior serious felony conviction

¹ All further statutory references are to the Penal Code.

(§ 667, subd. (a)) and prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and that he served three prior prison terms (§ 667.5, subd. (b)). The trial court sentenced him to 13 years in state prison: four years on one of the criminal threats convictions, a consecutive one year four months on each of the remaining convictions, and a consecutive five years on the prior serious felony enhancement. The court struck the three prior prison term enhancements.

Grandberry contends: (1) the evidence was not sufficient to support his criminal threats convictions; (2) the evidence was not sufficient to support his dissuading a witness conviction; (3) the gang enhancement must be vacated because the gang expert relied on case-specific hearsay; (4) the trial court erroneously denied his motion for a new trial; (5) the prosecutor committed misconduct; and (6) the case should be remanded to permit the court to exercise its discretion to strike or impose the prior serious felony enhancement. We reverse one of Grandberry's convictions for making criminal threats, reverse his conviction for dissuading a witness, and remand to permit the trial court to exercise its discretion to strike or impose the serious felony enhancement. In all other respects, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On July 30, 2014, a pool lifeguard saw Grandberry write something on a nearby park bench. Later that day, the lifeguard told his boss, S.C., what he had seen. They went to the bench and saw that Grandberry had written "Raymond Avenue Crips" on it.

On August 2, another lifeguard, J.M., noticed a duffel bag filled with pill bottles and syringes as she walked to the pool. She called her supervisor and reported what she had seen. About

an hour later, Grandberry approached the facility, yelling obscenities at staff members. He called B.S. a “black bitch.” His tone was loud and angry. When J.M. asked him to calm down, Grandberry replied, “Shut the fuck up, you wetback.” He then left.

Grandberry returned a few hours later. He walked into the lifeguard office yelling and cursing. Frightened, J.M. called 911. As she was on the phone, Grandberry said, “Bitch, you best not be calling who I think you are right now.” He then told J.M., “I’m going to be back [and] fuck you . . . up.” J.M. told S.C. about the incident the next day.²

On August 7, S.C. heard Grandberry yelling at two pool staff members. He was punching his palm with his fist. S.C. asked him if he needed help. He replied, “I’m not talking to you, bitch.”

After he calmed down, Grandberry told S.C. that he felt disrespected because no one paid attention when he asked pool staff to remove the syringe-filled duffel bag on August 2. He grew agitated again and yelled that he was “going to get some homegirls to fuck up that black bitch,” referring to B.S. He said he knew what car J.M. drove and was going to slash her tires. He then punched his palm with his fist. As he left, he said he was a Crips gang member and his gang controlled the area around the pool.

S.C. told B.S. about the incident the next day. B.S.’s eyes filled with tears and her voice grew shaky. A few days later, S.C. told J.M. about the incident. S.C. told J.M. she should

² At trial, J.M. alternatively testified that she did and did not know that Grandberry was a gang member with the nickname “Moose.”

“watch [her] back.” J.M. was scared and asked if Grandberry was going to return to the pool.

S.C. and B.S. were working at the pool on August 11 when Grandberry arrived and began yelling. He said S.C. and B.S. were racists. He called B.S. a “black bitch.” Both women were scared.

S.C. called 911. She said Grandberry had been coming to the pool and threatening staff members. She called him a “gangster” and said, “Last time he said he was going to beat up one of my lifeguard attendants, and then he said he was gonna slash our tires.”

Grandberry represented himself at trial. Detective Julius Gomez testified that he has 10 years of experience dealing with the Raymond Avenue Crips. The gang’s territory encompasses the pool where the incidents occurred. The detective familiarized himself with Grandberry by reading crime reports and reviewing field identification (FI) cards completed by other law enforcement officers in 2005, 2008, and 2014.³ Detective Gomez also spoke with the officers who completed FI cards. One of the cards said that Grandberry self-identified as a Raymond Avenue Crips member. His moniker was “Moose” or “Little Moose.”

Detective Gomez opined that Grandberry is an active member of the Raymond Avenue Crips based on the 2014 FI card and the incidents at the pool. Based on a hypothetical scenario in

³ An FI card includes the date, time, and location of an encounter with an alleged gang member; the reason for the encounter; the gang member’s contact information; a physical description of the gang member; the gang member’s contacts and associates; and any other relevant information.

which an active gang member writes “Raymond Avenue Crips” on a bench in the gang’s territory, Detective Gomez opined that the vandalism would benefit the Raymond Avenue Crips. It would signal to both civilians and rival gang members that they were in the gang’s territory.

Deputy Jonathan Stambrook testified that he responded to the pool on August 13. J.M. told him about the August 2 incident. S.C. said Grandberry threatened her on August 7. She said that Grandberry also threatened B.S. that day, but did not say that Grandberry threatened J.M.

Grandberry testified that he was at his cousin’s apartment, across the street from the pool, on August 2. He approached B.S. because he found her attractive. When he saw the syringe-filled duffel bag outside the pool, he tried to alert lifeguards, but they ignored him. He cursed and yelled because he wanted them to remove the bag. The yelling and cursing were not directed at J.M. or B.S.

Grandberry said the only staff members present on August 2 were J.M. and B.S. When he left the pool that day he saw J.M. pick up the phone and said, “Oh, you going to call the police on me? I didn’t [do] nothing.” He then went back to his cousin’s apartment.

On cross-examination, Grandberry denied writing graffiti on the bench. He said he was never at the pool other than on August 2. When confronted with S.C.’s 911 call from August 11, Grandberry said she was lying.

Grandberry denied that he was a member of the Raymond Avenue Crips, but said he was “affiliated” with the gang by virtue of his brother’s, uncle’s, and cousin’s respective memberships. He said he was familiar with the gang’s culture

because of his family. He denied that he yelled “Raymond, Raymond, Raymond” from a patrol car during an encounter with sheriff’s deputies. He said the FI cards were based on officers’ stereotypes.

After the jury convicted him on all charges, Grandberry moved for a new trial based on insufficient evidence to support his convictions. (See § 1181, subd. (6).) In his motion, Grandberry “point[ed] out alternative interpretations of the evidence and disputes with the veracity of [J.M.’s] and [S.C.’s]” testimony. The trial court said: “[T]hese matters were for the jury to determine This court cannot share [Grandberry’s] interpretation of the evidence or to [*sic*] resolve any conflicts in the evidence as he perceives them to raise a credible or substantial doubt [as to] the sufficiency of the evidence to support the jury’s decision.” It denied the motion.

DISCUSSION

Criminal threats

To uphold Grandberry’s convictions for making criminal threats against J.M. and B.S. on August 7, there must be proof that: (1) Grandberry “willfully threatened to commit a crime [that would] result in death or great bodily injury,” (2) he “made the threat ‘with the specific intent that the statement [was] to be taken as a threat,’” (3) the threat “was ‘on its face and under the circumstances in which it was made, so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution,’” (4) the threat “actually caused [J.M. and B.S.] ‘to be in sustained fear for [their] own safety or for [their] immediate [families’] safety,’” and (5) J.M.’s and B.S.’s fears were

“reasonable’ under the circumstances.”⁴ (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228, alterations omitted.)

Grandberry contends his conviction for threatening J.M. should be reversed because the prosecution did not prove the first of these elements. With respect to B.S., he challenges the second and third elements, contending: (1) his “emotional outburst” did not convey an immediate prospect of execution, (2) he did not intend that S.C. convey his threat to B.S., and (3) there was no evidence that S.C. did, in fact, convey the threat to B.S.

We review these contentions for sufficiency of the evidence. We “review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence [that] is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Davis* (1995) 10 Cal.4th 463, 509 (*Davis*).) We ““presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” [Citation.]” (*Ibid.*) We will uphold the jury’s determinations if, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.]” (*Ibid.*, italics omitted.)

1. Threats to J.M.

We agree with Grandberry that the evidence does not support his conviction for making criminal threats against J.M. When he went to the pool on August 7, Grandberry told S.C. that he was going to slash J.M.’s tires. Threatening to damage

⁴ The Attorney General concedes Grandberry did not make criminal threats on August 2 or August 11.

property is not a threat to commit an act that will result in death or great bodily injury. (See *In re Ryan D.* (2002) 100 Cal.App.4th 854, 863 [a criminal threat is an “expression of an intent to inflict serious evil *upon another person*” (italics added)].)

The Attorney General counters that S.C.’s statement that J.M. should “watch her back,” transforms Grandberry’s threat into one that will cause death or great bodily injury. But those were S.C.’s words, not Grandberry’s. And Grandberry’s act of punching his palm and his statement that his gang controlled the area around the pool do not convert his words into a threat to cause injury or death. While such circumstances may indicate that Grandberry intended his statement be taken as a threat or that it conveyed an immediate prospect of execution (see *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1341, superseded by statute on other grounds as stated in *People v. Franz* (2001) 88 Cal.App.4th 1426, 1442), they do not change the definitions of the words Grandberry used. Grandberry’s conviction for making a criminal threat against J.M. must be reversed.

2. Threats to B.S.

We reach the opposite conclusion with regard to Grandberry’s threats to B.S. Considered with its surrounding circumstances, Grandberry’s threat that he was “going to get some homegirls to fuck up that black bitch” conveyed an immediate prospect of execution. Grandberry was agitated when he threatened B.S. (*People v. Franz* (2001) 88 Cal.App.4th 1426, 1448-1449 [defendant’s hostile demeanor tends to show an immediate prospect of execution].) He threatened her after she ignored his warning about the duffel bag full of syringes. (*People v. Wilson* (2010) 186 Cal.App.4th 789, 814-815 [prior disagreements between defendant and victim tend to show an

immediate prospect of execution].) And he was often near the pool, going there at least four times over the span of two weeks. (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1348 [defendant's proximity to victim tends to show an immediate prospect of execution].)

S.C.'s decision to wait to tell B.S. about Grandberry's threat until the next day does not negate its immediacy. "A threat is not insufficient simply because it does 'not communicate a time or precise manner of execution.'" (*People v. Butler* (2000) 85 Cal.App.4th 745, 752.) Moreover, Grandberry returned to the pool four days after he threatened B.S., yelling at her and calling her a "black bitch" again. (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013 [defendant's subsequent actions can show immediate prospect of execution].) The totality of the circumstances show an immediate prospect of execution.

The circumstances also show that Grandberry intended that S.C. convey his threat to B.S. (Cf. *People v. Felix* (2001) 92 Cal.App.4th 905, 913 [when threat conveyed through third party, defendant must intend that third party convey threat to victim].) The "climate of hostility" between Grandberry and B.S. "readily support[s] the inference" that he intended to threaten B.S. (*In re David L.* (1991) 234 Cal.App.3d 1655, 1659.) And communicating the threat to S.C.—B.S.'s coworker who witnessed Grandberry's other hostilities—supports the inference that he intended that S.C. convey the threat to B.S. (*Ibid.*)

Finally, S.C. testified that she conveyed Grandberry's threat to B.S. A reasonable jury could find that S.C. did so. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) That B.S. did not testify is irrelevant. Sufficient evidence supports Grandberry's conviction for making criminal threats against B.S.

Dissuading a witness

Grandberry contends his conviction for dissuading a witness must be reversed because the prosecution did not present evidence that J.M. was either a victim or a witness when she called police on August 2. (See § 136.1, subd. (b)(1) [prohibiting “attempts to prevent or dissuade another person *who has been the victim of a crime or who is witness to a crime* from . . . [¶] [m]aking any report of that victimization to any peace officer” (italics added)].) We agree.

The only crime Grandberry committed prior to August 2 was the vandalism of the park bench on July 30. But there was no evidence that J.M. knew about that crime. She was thus neither a victim of or a witness to a crime when Grandberry said, “Bitch, you best not be calling who I think you are right now.” (Cf. § 136, subds. (2) [a “witness” is a person with “knowledge of the existence or nonexistence of facts relating to any crime”] & (3) [a “victim” is a person “with respect to whom there is reason to believe that any crime . . . is being or has been perpetrated or attempted to be perpetrated”].)

Relying on *People v. Pettie* (2017) 16 Cal.App.5th 23, the Attorney General claims section 136.1, subdivision (b)(1), prohibits attempts to dissuade “any report of a crime to law enforcement,” including a report by a person who is “ultimately the victim” of a crime in the future. The Attorney General misreads *Pettie*. The *Pettie* victim called police to report that one of the defendants had hit his daughter. (*Id.* at p. 34.) The defendants later assaulted him. (*Id.* at p. 53.) The Court of Appeal upheld the defendants’ dissuasion convictions because a jury could reasonably infer that they intended to prevent the victim from making additional reports about his daughter’s

abuse. (*Id.* at p. 55.) But the court also noted that the victim was already a witness to a crime when he made his initial report. (*Id.* at p. 54, citing § 136, subd. (2).) Here, in contrast, there was no evidence that J.M. knew of any facts related to a crime when she called police on August 2. We must therefore reverse Grandberry's dissuasion conviction.

Gang enhancement

Grandberry contends the jury's true finding on the gang allegation must be vacated because Officer Gomez relied on FI cards to conclude that he is a member of the Raymond Avenue Crips. But even if we assume that the FI cards on which Officer Gomez relied included testimonial hearsay (see *People v. Sanchez* (2016) 63 Cal.4th 665, 697-698 (*Sanchez*)), Grandberry has not shown prejudicial error.

S.C. and another lifeguard saw Grandberry write "Raymond Avenue Crips" on a park bench. J.M. testified that she knew on August 2 that Grandberry's nickname was "Moose." S.C. testified that Grandberry told her he was a member of the Crips on August 7. She also told the 911 operator that Grandberry was a "gangster" on August 11. And Grandberry admitted at trial that he is "affiliated" with the Raymond Avenue Crips. Because this independent, competent evidence tended to prove Grandberry's membership in the Raymond Avenue Crips, Officer Gomez's testimony about that membership was permissible. (*Sanchez, supra*, 63 Cal.4th at p. 686; see also *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 510 ["If prior unobjected testimony supported the prosecution experts' case-specific testimony, the testimony was not objectionable under *Sanchez*"].) His reliance on any case-specific testimonial hearsay in the FI cards was harmless beyond a reasonable doubt. (*People*

v. Meraz (2018) 30 Cal.App.5th 768, 783, review granted on another issue, Mar. 27, 2019, S253629; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 414.)

New trial motion

Grandberry contends his criminal threats and dissuasion convictions should be reversed because the trial court erroneously denied his motion for a new trial when it failed to independently examine the evidence to determine whether it was sufficient to prove the charges against him. (See § 1181, subd. (6).) The Attorney General argues Grandberry forfeited his contention because he did not object to the trial court’s failure to rule on the new trial motion (*People v. Braxton* (2004) 34 Cal.4th 798, 813) and because he does not raise the same ground on appeal that he raised in his posttrial motion (*People v. Masotti* (2008) 163 Cal.App.4th 504, 508). But the court ruled on Grandberry’s motion. And the ground he raises here is the same as that raised below. The contention is not forfeited. We nevertheless reject it.

Section 1181, subdivision (6), permits the trial court to grant a motion for a new trial “[w]hen the verdict . . . is contrary to law or evidence.” When reviewing the motion, the court must independently weigh the evidence to “determine whether it is sufficient to prove each required element beyond a reasonable doubt to the judge, who sits, in effect, as a ‘13th juror.’ [Citations.]” (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133, italics omitted.) The court “is, however, guided by a presumption in favor of the correctness of the verdict and proceedings supporting it.” (*Davis, supra*, 10 Cal.4th at p. 524.) It “should not disregard the verdict but instead should consider the proper weight to be accorded to the evidence and then decide whether or

not, in its opinion, there is sufficient credible evidence to support the verdict.’ [Citation.]” (*Ibid.*, alterations omitted.)

We review the denial of a new trial motion for abuse of discretion. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) ““We accept the trial court’s credibility determinations and findings on questions of historical fact if supported by substantial evidence.” [Citation.]’ [Citation.]” (*People v. O’Malley* (2016) 62 Cal.4th 944, 1016.) We will uphold the court’s ruling ““unless a manifest and unmistakable abuse of discretion clearly appears.” [Citations.]” (*Delgado*, at p. 328.)

There was no abuse of discretion here. The trial court noted that Grandberry’s motion “point[ed] out alternative interpretations of the evidence and disputes with the veracity of [J.M.’s] and [S.C.’s]” testimony. The court then stated that it did not share Grandberry’s interpretation of the evidence. It also stated that it found no “credible or substantial doubt as to the sufficiency of the evidence to support the jury’s decision.” These statements demonstrate that the court independently weighed the evidence and determined that it was sufficient to support the verdict. (*People v. Price* (1992) 4 Cal.App.4th 1272, 1275 (*Price* [trial court’s statement that evidence was sufficient reflects exercise of independent judgment].))

That the court also stated that Grandberry’s challenges to the evidence were “matters . . . for the jury to determine” does not change our conclusion. “[I]solate[d] statements in which the trial court refers to the jury’s verdicts” do not show that it applied the wrong standard. (*Davis, supra*, 10 Cal.4th at p. 524; see also *Price, supra*, 4 Cal.App.4th at p. 1275 [court’s statement “I think that the jury—there was enough evidence there for the jury to do what the jury did” did not reflect

application of erroneous standard when read with court's other statements].)

Grandberry's reliance on our decision in *People v. Carter* (2014) 227 Cal.App.4th 322 is misplaced. The *Carter* trial court stated that it "would have weighed the evidence differently" than the jury and that it "would have had a reasonable doubt" as to the defendant's guilt. (*Id.* at p. 326.) The court's statements showed that it misunderstood its duty to independently weigh the evidence when deciding the new trial motion. (*Id.* at p. 328.) The trial court here, in contrast, stated that it did not share Grandberry's interpretation of the evidence but instead agreed with the jury's decision.

Prosecutorial misconduct

Grandberry contends he was denied a fair trial because the prosecutor committed misconduct when he "smuggled" in inadmissible evidence by asking improper questions and including arguments during cross-examination. (*People v. Hill* (1998) 17 Cal.4th 800, 827-828 [misstatement of facts and reference to facts not in evidence]; *People v. Criscione* (1981) 125 Cal.App.3d 275, 292 [argument during cross-examination].) But Grandberry neither objected nor requested curative admonitions. And simply because the prosecutor's alleged "multiple instances" of misconduct would have required several objections and requests for admonitions does not show that the objections and requests would have been futile. (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 857-858; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 178-179.) Grandberry has forfeited this contention. (*Daveggio and Michaud*, at p. 858; *Letner and Tobin*, at p. 179.)

Grandberry also contends the prosecutor committed misconduct when he presented the allegedly false testimony of J.M. and S.C. to the jury. (*People v. Marshall* (1996) 13 Cal.4th 799, 829-830.) But again, Grandberry did not object during the prosecutor's direct examination of J.M. And none of his objections to S.C.'s testimony pertained to its alleged falsity: two were date clarifications, two were objections to leading questions, one was an objection to an exhibit, and one was a hearsay objection. He forfeited this contention as well. (*People v. Wilson* (2008) 44 Cal.4th 758, 799-801 (*Wilson*).)

That Grandberry raised a similar contention in his new trial motion does not change our conclusion. To preserve an issue for appeal, the requisite objections must be timely. (*Wilson, supra*, 44 Cal.4th at p. 800.) Here, they were not.

Prior serious felony enhancement

When the trial court sentenced Grandberry, section 667, subdivision (a), required it to add five years to his sentence because of his prior serious felony conviction. Former subdivision (b) of section 1385 prohibited the court from striking the enhancement. Effective January 1, 2019, the court has discretion to strike the enhancement for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

Grandberry contends, and the Attorney General concedes, the amendments to sections 667 and 1385 apply retroactively to his case because it is not yet final. We agree. (*Garcia, supra*, 28 Cal.App.5th at pp. 971-973; see *In re Estrada* (1965) 63 Cal.2d 740, 744.) On remand, the trial court must hold a hearing to determine whether to impose or strike the five-year serious felony enhancement.

DISPOSITION

Grandberry's conviction for making criminal threats against J.M. and his conviction for dissuading a witness are reversed. The case is remanded to the trial court with directions to exercise its discretion to impose or strike the prior serious felony enhancement. Grandberry has the right to the assistance of counsel at the remand hearing, and, unless he chooses to forgo it, the right to be present. After the hearing, the clerk of the court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Gary Y. Tanaka, Judge
Superior Court County of Los Angeles

Gary V. Crooks, under appointment by the Court of
Appeal, for Defendant and Appellant.

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